United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

NO. 76-4108

United States Court of Appeals

FOR THE SECOND CIRCUIT

KENSTON TRUCKING COMPANY, INC.,
KENSTON WAREHOUSING CORP., AND RHEIN EXPRESS, INC.,

Petitioner,

v.

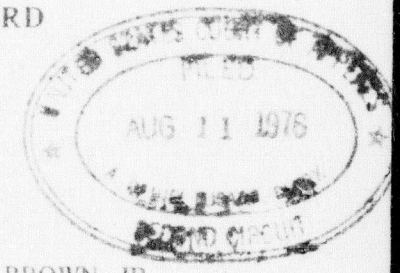
NATIONAL LABOR RELATIONS BOARD,

Respondent.

B
P/S

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF A SUPPLEMENTAL ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD



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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Company did not make a valid offer of reinstatement to discriminatee Thomas Walker.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Kenston Trucking Company, Inc., Kenston Warehousing Corp., and Rhein Express, Inc.,[1] (herein "the Company") pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) (herein "the Act") to review a supplemental decision and order of the National Labor Relations Board. The Board has cross-applied under Section 10(e) of the Act for the enforcement of its order. The Board's supplemental decision and order (A. 42-45)[2] issued on March 30, 1976, and is reported at 223 NLRB No. 68. This Court has jurisdiction of the proceeding, as the Company's place of business is in Brooklyn, New York.

I. THE UNDERLYING JUDICIAL AND UNFAIR LABOR PRACTICE PROCEEDINGS

On April 11, 1974, this Court entered a judgment by default enforcing the Board's order in the underlying proceeding herein in which the Company was found by the Board to have committed violations of Section 8(a)(1), (3), (4) and (5) of the Act.[3]

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[1] On March 11, 1975, the three named companies stipulated that for the purposes of this proceeding they constitute an integrated enterprise which is the successor in interest to Kenston Trucking Company, Inc., respondent in the underlying unfair labor practice proceeding (A. 37-38, n. 1). See n. 2, *infra*.

[2] "A" references are to pages of the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] The Board's decision and order in the underlying proceeding is reported at 205 NLRB 1050 (1973).

In the underlying unfair labor practice proceeding the Board found that the Company violated Section 8(a)(1) of the Act by threatening to close down and to discharge employees who espoused the Union,[4] by coercively interrogating employees about their union activities, by conducting an unlawful poll about employee sentiment towards the Union, and by discriminatorily changing working conditions. 205 NLRB at 1051-1052. The Board also found that the Company constructively discharged three of its seven employees: Thomas Walker, George Hill, and Joseph Barrier, because of their activities on behalf of the Union. Hill and Walker had been instigators of the organizational activities. *Id.* at 1052. Finally, the Board found that Company President John Luhrs threatened Hill with a gun for testifying at one of the Board hearings held in the case, thus violating Section 8(a)(4) and (1). *Id.* at 1052-1054. The Board's order required the Company to offer Walker, Hill, and Barrier reinstatement to their former or substantially equivalent jobs and to make them whole for any loss of earnings suffered as a result of their discharges. The order also required the Company to make its employees whole for their losses in earnings due to its discriminatory changes in working conditions. Finally, because the unfair labor practices committed by the Company were so pervasive and so egregious, and because a majority of the employees had signed unambigious union authorization cards, the Board's order required the Company to bargain, upon request, with the Union. *Id.* at 1050, 1054-1055.

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[4] Local 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

II. THE BACKPAY PROCEEDING AND THE BOARD'S SUPPLEMENTAL ORDER

On June 11, 1975, the Regional Director for Region 29 issued a backpay specification and notice of hearing detailing the amount of money due Thomas Walker and the other employees discriminatorily treated by the Company (A. 37). On August 4, 1975 a backpay hearing was held before an Administrative Law Judge in accordance with the Board's Rules and Regulations (29 C.F.R.), Section 102.52-102.59 at which the parties entered into an agreement providing for settlement of the Company's backpay liability to all of the discriminatees except Walker (A. 38; 2). Thus, the sole matter litigated at the hearing concerned the issue of whether the Company made a valid offer of reinstatement to Walker on June 17, 1973, the Company taking the position that it did make such an offer and that its backpay liability terminated at that time.

After the hearing, the Administrative Law Judge issued a supplemental decision in which he concluded that the Company's position with respect to its backpay obligation to Walker was correct (A. 37-41). Subsequently the Board, reversing this determination (Member Jenkins dissenting), held that Walker was entitled to back pay in the amount sought by the General Counsel, and issued a supplemental decision and order to that effect (A. 42-45).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY DID NOT MAKE A VALID OFFER OF REINSTATEMENT TO DISCRIMINATEE THOMAS WALKER.

It is well settled that the Board has broad discretion in shaping the traditional backpay remedy authorized by Section 10(c) of the Act to compensate the victims of unlawful discrimination. The Supreme Court recently described the Board's powers in this area in *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969):

> We start with the broad command of § 10(c) of the National Labor Relations Act . . . that upon finding that an unfair labor practice has been committed the Board shall order the violator "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1974).
>
> . . . As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). "When the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Id.* at 346-347.

The law is clear that the "finding of an unfair labor practice and discriminatory discharge is presumptive proof that some backpay is owed" (*N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (C.A. 2, 1965),

cert. denied, 384 U.S. 972), and that the General Counsel's burden is limited to showing "what would not have been taken from [the employee] if the Company had not contravened the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 544 (1943). As stated in *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 454 (C.A. 8, 1963):

> . . . in a backpay proceeding the burden is upon the General Counsel to show the gross amount of backpay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.

In order for an employer to meet his reinstatement obligation under a Board remedial order and thus prevent further increase in his backpay liability, "a full and unconditional offer of reinstatement to the employee's former position is required." *Oil, Chemical, and Atomic Workers v. N.L.R.B.*, 92 LRRM 3185, 3187, n. 3 (C.A.D.C., 1976), and cases cited. Where, as here, a dispute arises as to whether a valid offer of reinstatement was made to an employee, the employer carries the burden of going forward with the evidence because he is "the party having knowledge of the facts involved." *N.L.R.B. v. Mastro Plastics Corp., supra,* 354 F.2d at 176.

In the instant case, the General Counsel alleged, and the Board found, that Walker's backpay period ran between May 12, 1972, the date of his discharge, and February 21, 1975, with the exception of 5 quarters when Walker's earnings exceeded what he would have earned had he continued in the Company's employ (A. 38). The Company contends that President John Luhrs made a valid offer of reinstatement to Walker on June 17, 1973, and that for that reason, Walker's backpay period should have terminated as of that date. The relevant facts found by the Board are as follows:

In June 1973, Walker was employed by Anchor Motor Freight (A. 39; 19). Walker met with Company President Luhrs on June 17, after Luhrs called him at home and asked him to come to the Company's warehouse for a talk (A. 39; 30). Luhrs testified that, after some general conversation, "I did ask him, you know, if he was satisfied where he was or if he wanted to come back to work, so forth" (A. 43; 32). Walker asked what rate of pay he would receive, and Luhrs replied that it would be the same rate he had been earning when he last worked for the Company. (A. 40; 31-32.) Walker laughed and indicated that he was earning more than that on his current job (A. 40; 32). Luhrs then asked whether they could discuss a settlement concerning the back pay in order to conclude the NLRB proceedings (A. 40; 33). Walker asked Luhrs what his settlement offer was and the latter mentioned $1,000 (A. 40; 34). Walker indicated that he did not consider that enough *(ibid.)*.[5]

The Board rejected the Company's assertion that Luhrs made a valid offer of reinstatement to Walker. Instead, the Board, on the basis of its evaluation of Luhr's testimony, found that "Luhrs was asking Walker what his job preferences were" and that Luhrs' question was "directed at determining Walker's interest in or availability for a job with the Company." The Board therefore found that Luhrs' question was not "a categorical invitation to return to work" (A. 43-44). Accordingly, the Board held that since Walker had no obligation during his conversation with Luhrs to make a decision about returning to work, the Company's backpay obligation was not terminated at that time (A. 44).

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[5] The Company's backpay liability to Walker at that time was $2,098 (A. 38). Walker testified that as a result of conversations with NLRB personnel he knew how much the Company owed him (A. 21-22, 26-27).

In reaching this conclusion, the Board applied the principle set forth in *REA Trucking Co.*, 176 NLRB 520, 526 (1969), where it stated:

> Employees who have been discriminatorily laid off or discharged are entitled to a specific and unequivocal offer of reinstatement. An inquiry of availability is not such an offer. A discharged employee is not to be held to have refused reinstatement until he has received such an unqualified offer, or until he has made some statement or engaged in some conduct which clearly renders such an offer futile, or relieves [the employer] of the obligation of making it.

Accord: *J.E. Plastics Mfg. Corp.*, 131 NLRB 299, 300, n. 4 (1960). And as the Board said in *Leeding Sales Co.*, 155 NLRB 755, 757 (1965), "It is axiomatic that a discriminatee need not make a choice of employment prior to receiving an unconditional offer of reinstatement."

The Board's conclusion in the instant case that Walker did not receive an unconditional offer of reinstatement, we submit, is reasonable and should be affirmed by the Court. As shown above, the Board held that the question put to Walker by Luhrs was phrased in terms of determining the latter's attitude about returning to work for the Company and did not constitute a firm offer of employment. Luhrs did not ask about Walker's availability for work, and did not indicate whether the Company had a job opening, or the particular job, if any, that he had in mind. In short, Luhrs was unspecific and noncommital, and clearly was only interested in finding out in advance what Walker's likely response would be to a job offer if one were made. As the cases cited above make clear, in order for an employer to toll his backpay liability to a discriminatorily discharged employee, he may not address a question to the employee that is merely "in the nature of a preliminary 'sounding out;' " rather, there must be "a clear and definite offer of reinstatement." *Barr Packing Co.*, 82 NLRB 1, 4 (1949).

When Walker asked Luhrs what wage he would receive if he returned to work, Luhrs stated that it would be the same rate of pay he had received when he last worked for the Company over a year previously. In the interim period there had been substantial inflation, with resulting increases in prices and wages, but Luhrs failed to give Walker any indication that he would take that into account by paying him more money.[6] Following this inconclusive discussion, Luhrs immediately brought up the question of settling the pending Board proceeding, and in this connection he offered $1,000 as a basis for settling it. Walker understandably rejected the offer as inadequate, since the Company's liability to him at that time was over $1,000 greater than the amount mentioned by Luhrs.

The Company's brief to the Court is misleading, because it does not discuss the portion of Luhrs' credited testimony that the Board specifically relied on as the basis for its decision. Thus, the Company (Br. 4-5) first quotes from testimony of Walker, which is taken completely out of context, for Walker did not testify that Luhrs made him an unconditional offer of reinstatement. Rather, he testified directly to the contrary – namely, that Luhrs made a job offer, coupled with an offer of $1,000, on the condition that Walker waive any further claims in the Board proceeding (A. 11-13). The Administrative Law Judge specifically discredited Walker's entire line of testimony (A. 41, 43) so it does not avail the Company to rely on it at this time.

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[6] Even though Walker was earning more money at the time working for Anchor Motor Freight, it is not uncommon for persons to accept lower paying employment for greater job security. As it turned out, Walker was discharged by Anchor in January 1974 (A. 39).

The Company's argument is also wide of the mark because it focuses on a portion of Luhrs' testimony that does not prove what Luhrs actually said to Walker. Thus, the Company at page 9 of its brief relies on Luhrs' claim that he "asked [Walker] if he was willing to come back to work for me" (A. 31). However, this testimony of Luhrs is not the best evidence of what occurred at the meeting between Luhrs and Walker, because the Company's counsel posed a further question in which Luhrs was asked to state specifically what he said to Walker. The record discloses the following (A. 32):

> Q. In the best that you can recall what was the language that you used in terms of asking Mr. Walker if he wanted to come back and work with you?
>
> A. . . . I did ask him, you know, if he was satisfied where he was or if he wanted to come back to work, so forth.

This testimony by Luhrs was credited by the Administrative Law Judge and was accepted by the Board as the best evidence of what Luhrs actually said to Walker. The Board therefore construed Luhrs' testimony exactly as he gave it (*supra*, p. 7). The Company now, however, seeks to avoid bringing attention to Luhrs' testimony and the question by counsel which evoked it, so it does not specifically discuss the Board's construction of the words that Luhrs used. The Board's construction is therefore unchallenged for purposes of this proceeding.

As the Board pointed out in its decision (A. 44, n. 3), this case is distinguishable from *Moro Motors, Ltd.*, 216 NLRB No. 29, 88 LRRM 1211 (1975), on which the Company relies (Br. 8-11). There, the Board found that the employer's remark amounted to an unconditional offer of reinstatement for the specific job formerly held by the discriminatee, and was interpreted by the discriminatee as such. Since the question posed

to the employee in that case differed from the one Luhrs posed to Walker, that case turns on different facts. There is obviously no merit, therefore, to the Company's assertion that the *Moro* case constituted a precedent which the Board was obliged to follow herein.

CONCLUSION

For the foregoing reasons it is respectfully submitted that judgment should be entered denying the petition for review and enforcing the Board's order in full.

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August, 1976.

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v.	)	Nos. 76-4140 76-4108
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Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Richard M. Caba
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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 9th day of August, 1976.